In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 530

INDEPENDENT ICE & COLD STORAGE COMPANY, INC., AND DAN ARIAS, PETITIONERS

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 183 F.Supp. 686. The opinion of the Court of Appeals (Pet. A 1-9) is reported at 294 F.2d 186.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1961. The petition for a writ of certiorari was filed November 1, 1961, but was not served upon the government until November 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it has been "settled finally by the courts" within the meaning of Section 16(c) of the Fair Labor Standards Act (1) that the movement of shrimp boats across state lines into international fishing waters and their return to port constitute "commerce" within the meaning of the Act, or (2) that the production of ice for use in the processing of shrimp for interstate commerce is "production of goods for commerce" within the meaning of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), are set forth at pages 4 and 5 of the Petition.

STATEMENT

These actions were brought by the Secretary of Labor under Section 16(c) of the Fair Labor Standards Act to recover unpaid minimum wages and overtime compensation. Corporate petitioner, which operates a plant in Tampa, Florida, for the manufacture of artificial ice, regularly sells ice, among other purposes, (a) for use in shrimp boats plying to and from international fishing waters to refrigerate the catch (R. 46, 49), and (b) for use in processing shrimp for interstate commerce by shrimp packing houses (R. 47, 49).

The ice sold to shrimp boats is blown into the hold of the vessels which fish from the Port of Tampa and

is transported out of the state for some 750 miles through international waters to fishing grounds in the Bay of Campeche off the coast of Mexico to refrigerate shrimp during the fishing operations and the vessels' return to Tampa (R. 46, 49). The ice sold to packing houses is consumed in preserving the shrimp during grading, peeling, and veining operations (R. 47).

The district court dismissed the actions on the ground that the question of coverage presented an issue of law not yet "settled finally by the courts" within the meaning of Section 16(c) of the Act (R. 50). The Court of Appeals reversed, holding (1) that the production of ice for the shrimp boats was production of goods for commerce (Pet. A-7), (2) that the production of ice for preservation of shrimp during processing is closely related and directly essential thereto, and is therefore production of goods for commerce (Pet. A-8), and (3) that, with respect to both questions, "there is no issue of law which has not been settled finally by the courts * * *" (Pet. A-9).

ARGUMENT

The petition asserts that a question of general importance is presented by the decision of the court below that the case involved no "issue of law which has not been settled finally by the courts" (Section 16(c)). Petitioner makes no such claim, however, with respect to the two underlying issues of coverage. No other reason for granting certiorari is urged in connection with the holding that manufacturing ice for shrimp boats fishing in international waters is

producing goods for commerce, but the holding that supplying ice for shrimp processors is production for commerce is said to be in conflict with *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, and *Mitchell* v. *Moore*, 241 F.2d 249 (C.A. 6).

The court below properly applied the "settled finally" requirement of Section 16(c) of the Act in accordance with the consistent interpretations of other courts of appeals and correctly decided the underlying questions of coverage. The facts of the instant case are not at all comparable to those in the cases asserted to be in conflict, and no question is presented warranting review by this Court.

1. The ruling of the court below "that there is no issue of law which has not been settled finally by the courts" (Pet. A-9) is based on judicial decisions which the subsequent discussion will show are clearly dispositive in principle of the questions of coverage here involved even though the facts were not identical. This interpretation of the "settled finally" proviso is in accord with numerous decisions that "incidental factual variations" such as obtain between any two cases, however fundamentally alike, do not render the issue of law unsettled and that a requirement of identical facts as a condition to an action under Section 16(c) would be an "extreme and unreasonable" construction which "would virtually nullify the salutary provision for the recovery of unpaid compensation without expense to the claimant." *Mitchell* v. *Emala & Associates*, 274 F.2d 781, 782, 783 (C.A. 4); *Mitchell* v. *C & P Shoe Corp.*, 286 F.2d 109, 113-114 (C.A. 5); *Mitchell* v. *Clyde Owen*

Sand & Gravel Co., 292 F.2d 71, 75 (C.A. 6); *Austford* v. *Goldberg*, 292 F.2d 234, 238 (C.A. 8).

2. Petitioners concede that there is coverage of the production of ice for the shrimp boats "if the excursion of a fishing boat into international waters and return to home port [is] covered by the definition of 'commerce,' as contained in Section 3(b) of the Act" (Pet. 14).[1] They contend, however, that such voyages are not "commerce" both because there is no foreign or interstate port of destination for the shrimp boats and because what is involved is simply the transportation of goods and not "trade, barter, or exchange" (Pet. 20). The former contention is clearly contrary to the explicit wording of the statute which defines commerce to include transportation "between any State and any place outside thereof." See *Walling* v. *Lowe*, 5 WH Cases 937 (S.D. Fla.) The latter position—that transportation without trade is not "commerce"—is foreclosed by *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497, which expressly notes that commerce under Section 3(b) of the Act includes "interstate transportation", and that the Act applies to employees engaged in the production of goods "for interstate transportation for use or consumption, as distinguished from transportation of

[1] The cases are clear that the production of ice for use in interstate transportation is "production of goods for commerce". *Atlantic Co.* v. *Walling*, 131 F.2d 518 (C.A. 5); *Chapman* v. *Home Ice Co. of Memphis*, 136 F.2d 353 (C.A. 6), certiorari denied, 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F.2d 689 (C.A. 6); and *Hamlet Ice Co.* v. *Fleming*, 127 F.2d 165 (C.A. 4), certiorari denied, 317 U.S. 634. Cf. *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16, fn. 14.

them for sale or exchange." 339 U.S. at 512. The scope of "commerce" under the Act, to the extent relevant here, has thus been "settled finally" by this Court.

The alternative basis of coverage, that "the manufacture and delivery of ice for the preservation * * * of the shrimp while in process of production for commerce is closely related and directly essential thereto", and is therefore itself "production of goods for commerce" (Pet. A-8), is similarly "settled finally by the courts". The furnishing of power, water, and other services to a producer for commerce has consistently been held to be production for commerce within the special definition of Section 3(j).[2] *McComb* v. *Farmers Reservoir & Irrigation Co.*, 167 F.2d 911 (C.A. 10), affirmed with a modification not here relevant, 337 U.S. 755; *Reynolds* v. *Salt River Valley Water Users Ass'n*, 143 F.2d 863 (C.A. 9), certiorari denied, 323 U.S. 764; *Lewis* v. *Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5); *Walling* v. *Amidon*, 153 F.2d 159 (C.A. 10); *West Kentucky Coal Co.* v. *Walling*, 153 F.2d 582 (C.A. 6); *Meeker Cooperative Light & Power Ass'n* v. *Phillips*, 158 F.2d 698, 699 (C.A. 8), affirming 63 F.Supp. 733 (D. Minn.); *Mitchell* v. *Mercer Water Co.*, 208 F.2d 900 (C.A. 3); *New Mexico Public Service Co.* v. *Engel*, 145 F.2d 636 (C.A. 10); *Davila* v. *Porto Rico Ry. Light & Power Co.*, 143 F.2d 236 (C.A.

[2] It is not material that the ice sold to shrimp processors was a small proportion of petitioner's overall business, as the petition argues (p. 29), since those sales were made "at regular and frequent intervals and in substantial amounts" (Pet. A-9). *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Mitchell* v. *Jaffe*, 261 F.2d 883 (C.A. 5).

1); *Walling* v. *Hamner*, 64 F.Supp. 690 (W.D. Va.); *Mitchell* v. *Moberly Fuel Co.*, 12 WH Cases 848, 30 Lab. Cases, para. 69,933 (E.D. Mo., 1956, not officially reported); *Holland* v. *Amoskeag Machine Co.*, 44 F.Supp. 884 (D. N.H.). The furnishing of ice to such a producer is but an "incidental factual variation" without legal significance.

Neither *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, nor *Mitchell* v. *Moore*, 241 F.2d 249 (C.A. 6), announces any rule of law inconsistent with that applied here. Both involve factual situations so different as to belie the suggestion of a conflict. In fact, both decisions recognize the continuing validity, after the 1949 amendment to Section 3(j), of the line of decisions relied upon by the court below. In *Zachry*, this Court referred to "supplying water to the producers of goods for commerce" as an illustration of coverage which, according to the legislative history, "remains unchanged by the amendment." 362 U.S. at 318. In *Moore*, the court cited these decisions as representing existing law but as inapplicable to the peculiar facts of that case. 241 F.2d at 250. Moreover, the legislative history makes clear that the 1949 amendment preserved the vitality of these decisions by including among its references to employees "whose work is closely related and directly essential to production" and who would remain within the amended coverage, those engaged in—

> 2. Producing and supplying fuel, power, water, or other goods for customers using such goods in the production of different goods for interstate

commerce. *Reynolds* v. *Salt River Valley Water Users Asso.* (143 F. (2d) 863 (C.A. 9)); *Phillips* v. *Meeker Coop. Light and Power Asso.* (158 F. (2d) 698 (C.A. 8)); *Lewis* v. *Florida Light and Power Co.* (154 F. (2d) 751 (C.A. 5)); *West Kentucky Coal Co.* v. *Walling* (153 F. (2d) 152 (C.A. 6)). * * * [95 Cong.Rec. 14874-75, see also H.Rept. No. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14928-29]

The decisions subsequent to the 1949 amendment have recognized the continuing effect of this line of cases. *Mitchell* v. *Mercer Water Co.*, 208 F.2d 900 (C.A. 3); *Mitchell* v. *Moberly Fuel Co.*, 12 WH Cases 848, 30 Lab. Cases, para. 69,933 (E.D. Mo., 1956 not officially reported); cf. *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40 (C.A. 1), certiorari denied, 366 U.S. 911.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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